32741 SERVICE DATE - LATE RELEASE JUNE 25, 2002
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34014

CANADIAN NATIONAL RAILWAY COMPANY
– TRACKAGE RIGHTS EXEMPTION –
BANGOR AND AROOSTOOK RAILROAD COMPANY
AND
VAN BUREN BRIDGE COMPANY

STB Finance Docket No. 34015

WATERLOO RAILWAY COMPANY
– ACQUISITION EXEMPTION –
BANGOR AND AROOSTOOK RAILROAD COMPANY
AND
VAN BUREN BRIDGE COMPANY

Decided: June 25, 2002

This decision addresses the petition of the Trustee of the Bangor & Aroostook Railroad Company (BAR) to reopen and to revoke the exemptions in these proceedings. Essentially, the exemption authority gives the Canadian National Railway Company (CN) the right to serve a shipper located on BAR's line. We find that the Trustee has not demonstrated that the exemptions should be revoked.

## BACKGROUND

The Fraser Paper Company (Fraser) plant at Madawaska, ME, has long been served by joint through service provided by BAR and CN. BAR moves cars between Fraser's plant at Madawaska and an interchange junction with CN at St. Leonard, Canada. CN provides long haul service beyond the interchange. BAR owns the track involved in this movement between Madawaska (BAR milepost 0.0) and Van Buren (Canadian Junction), ME (BAR milepost 22.72). BAR's wholly owned subsidiary, the Van Buren Bridge Company (VBBC), owns the track between Van Buren (VBBC milepost 0.0) and the interchange with CN at St. Leonard, Canada. BAR trains cross the St. Johns

River over a VBBC railroad bridge at the Canadian border at VBBC milepost 0.31. Before March 2001, BAR and CN quoted a joint rate for the service and agreed upon a division of this rate.

In March 2001, CN and BAR terminated the joint rate arrangement. In its place, BAR and CN executed: (1) a "Junction Settlement Agreement,"[1] under which CN gave BAR's parent company $5 million in exchange for BAR's agreement to a haulage arrangement[2] with CN in lieu of BAR's prior division of joint rate revenue for hauling CN cars between Fraser's plant and the CN interchange at St. Leonard, Canada; (2) BAR's and VBBC's grant to CN of overhead trackage rights (the Trackage Rights Agreement) between Madawaska and the Canadian border at VBBC milepost 0.31, a distance (in the U.S.) of approximately 23.03 miles; and (3) BAR's and VBBC's conveyance to CN's Class III subsidiary, the Waterloo Railway Company (Waterloo), of a "freight operating easement" (the Operating Agreement) between the same points.[3] The parties filed notices with the Board under 49 CFR 1180.2(d)(7) and 1150.41, respectively, for exemption authority to allow them to implement the trackage rights and operating agreements. Separate notices of the trackage rights and operating exemptions were served on March 21, 2001, and published in the Federal Register at 66 FR 15941 (Mar. 21, 2001), in STB Finance Docket Nos. 34014 and 34015.[4]

On August 15, 2001, an involuntary Chapter 11 bankruptcy proceeding was filed against BAR. The United States Bankruptcy Court for the District of Maine (the Bankruptcy Court) granted an order for relief on December 4, 2001. A trustee in bankruptcy for BAR (the Trustee) was appointed on or about December 28, 2001.

On March 18, 2002, the Trustee filed a motion with the Bankruptcy Court seeking authority to reject all three agreements that precipitated the filing of the notices — the Junction Settlement

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[1] A copy of the Agreement is attached to the Trustee's petition for revocation.

[2] Under the haulage arrangement, BAR agreed to accept an indexed per-car fee from CN, currently $500 per car. Basically, BAR performs the same physical transportation service as it did before March 2001, but it now does so under contract with CN. CN can now quote its own rate to Fraser for the entire movement, and it deals with Fraser directly. CN and Fraser have entered into a contract for rail service that expires in 2004.

[3] Waterloo recorded the Operating Agreement as an easement with the Aroostook County, Maine, Register of Deeds.

[4] CN's acquisition of rights over VBBC track in Canada (between the border and the junction with CN at St. Leonard) was not subject to the Board's jurisdiction.

Agreement, the Trackage Rights Agreement, and the Operating Agreement.[5] In this motion, the Trustee argued that these agreements are burdensome to the estate and that their rejection will result in a higher purchase price being paid by the buyer of the estate's assets. The Trustee also expressed an intention to initiate this proceeding before us to terminate the trackage rights authorized in STB Finance Docket No. 34014.

On April 24, 2002, BAR's Trustee filed a petition with the Board to reopen and to revoke the exemptions granted in STB Finance Docket Nos. 34014 and 34015. The Trustee argues that his request to reopen is governed by 49 CFR 1115.4, which requires a showing of material error, new evidence, or substantially changed circumstances.[6] The Trustee asserts that the bankruptcy and the petition before the Bankruptcy Court to reject the three agreements constitute a substantial change of circumstances warranting reopening and revocation. The Trustee also argues that there will be "no consensual underpinnings for the Notices of Exemption" if the Bankruptcy Court grants the Trustee's motion to reject the agreements that required the filing of the notices. The Trustee emphasizes that CN has not commenced operations under the trackage rights and maintains that this indicates that revocation would not harm the shipper, Fraser.

On May 10, 2002, CN[7] filed a reply in opposition to the Trustee's petition to revoke the exemptions in these proceedings. CN argues that the Trustee's petition must be dismissed. CN notes that the proper procedure for the Trustee to follow is to seek to terminate CN's right to operate over the line by filing an adverse (third party) discontinuance proceeding under 49 U.S.C. 10903,[8] citing

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[5] The Trustee attached this motion to its petition for revocation. In this motion, the Trustee argued that the three agreements are candidates for rejection because they are "executory." That is, because performance is due under each of them, the Trustee argues that the Bankruptcy Court may excuse the estate from any further obligations under them. The Trustee later withdrew his motion to reject the Operating Agreement.

[6] The Trustee cites Indiana Hi-Rail Corporation–Lease and Operation Exemption–Norfolk and Western Railway Company Line Between Rochester and Argos, IN, and Exemption from 49 U.S.C. 10761, 10762, and 11144, Finance Docket No. 32162, et al. (STB served Jan. 30, 1998) (Indiana Hi-Rail).

[7] CN was joined in this reply by its subsidiary, Waterloo. For convenience, we will continue to refer only to CN, except where specifically noted.

[8] Our authority to grant adverse discontinuances or abandonments of service is well established: see the line of cases beginning with Modern Handcraft, Inc.–Abandonment, 363 I.C.C.

(continued...)

Milford-Bennington Railroad Company, Inc.–Trackage Rights Exemption–Boston and Maine Corporation and Springfield Terminal Railway Company, Finance Docket No. 32103 (ICC served Sept. 3, 1993) (Milford-Bennington) and cases cited therein. CN argues that the Trustee's petition involves the issue of whether Fraser should have to lose the competitive option of being able to be served by CN as well as by BAR, an issue that, CN says, can best be evaluated in the context of an adverse discontinuance proceeding. CN also argues that, were we to consider BAR's petition on its merits rather than dismiss it, we should deny it because the Trustee has not met the standard for revocation of an exemption under 49 U.S.C. 10502(d): that revocation would advance the rail transportation policy of 49 U.S.C. 10101. CN does not dispute the Trustee's contention that CN has not begun operations under the trackage rights, but the carrier responds: (1) that its lack of operations does not establish that the rights authorized by the exemption have not been legally consummated; (2) that it has attempted to utilize the trackage rights but has been prevented from doing so by BAR;[9] and (3) that, in any event, its lack of activity would not justify revocation.

On May 14, 2002, a joint reply supporting the Trustee was filed by Bank Austria Creditanstalt Corporate Finance, Inc., and Bank Austria Creditanstalt SBIC, Inc. (collectively, the Creditors), the principal secured creditors of BAR. The Creditors argue that: (1) revocation of the exemptions would not adversely affect the shipper, Fraser; (2) precedents requiring the Trustee to file an adverse discontinuance application do not apply here because "CN never activated the trackage rights;" (3) we should follow a precedent holding that trackage rights expire without revocation when they have not been used; and (4) the rail transportation policy of 49 U.S.C. 10101 supports revocation.

On May 16, 2002, Fraser filed a petition for leave to intervene under 49 CFR 1112.4 and attached a verified statement from Austin S. Durant, Fraser's transportation manager. Mr. Durant testifies that revocation of CN's trackage rights would adversely affect Fraser. Fraser's petition to intervene will be granted.

The Trustee filed a reply to Fraser's statement on May 30, 2002, and attached a statement of BAR President, Fred W. Yocum, Jr. The Trustee argues that we should not view the "security and competitive benefits" obtained by Fraser as a result of the trackage rights as something to which Fraser is entitled.

On June 3, 2002, CN filed a supplemental reply addressing the issues raised by the Creditors and informing us of two new developments. One new development was that the Bankruptcy Court had

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[8](...continued)
969 (1981).

[9] See page 6 of the Verified Statement of Clifford L. Carson, attached to CN's Reply.

stayed its proceedings pending completion of proceedings before the Board.[10] The other new development was an announcement by the Montreal, Maine & Atlantic Railway, LLC (MMA) that it had signed an asset purchase agreement with the Trustee to purchase the assets of BAR and its affiliates.

On June 5, 2002, MMA filed a motion to intervene and accompanying comments supporting the Trustee's petition to revoke. MMA confirmed that it signed an agreement with the Trustee on May 23, 2002, for the purchase of all assets of the BAR system. Attempting to distinguish Milford-Bennington, supra, MMA argues that the Trustee is not required to bring an involuntary discontinuance proceeding to terminate the trackage rights, because CN has not commenced operations under the trackage rights.[11] MMA's petition to intervene will be granted.

On June 11, 2002, the Creditors filed a reply addressed to the arguments raised in CN's June 3, 2002 supplemental reply. The Creditors elaborate on their argument that BAR should not have to file an adverse discontinuance action, because CN has not begun operations under the trackage rights exemption. Adding another argument against requiring an adverse discontinuance proceeding, the Creditors maintain that any attempt to prove that there is no public need for CN's service under the trackage rights would require the "inherently difficult" task of proving a negative. The Creditors also argue that we should revoke the exemption because their interest and that of the Trustee are "aligned with the public interest." The Creditors dispute CN's and Fraser's contentions that the exemptions increase the competitive options available to that shipper.

On June 18, 2002, CN replied to MMA's motion to intervene and to the Creditors' June 11, 2002 pleading. This filing by CN largely reiterates points made previously.

## DISCUSSION AND CONCLUSION

The action that the Trustee has asked us to take is to revoke the exemptions that permit CN to operate over BAR's line. At the outset, we should note that there was some discussion at the Bankruptcy Court hearing about what it means when we issue an exemption in a case like this one. The

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[10] CN attached a transcript of the hearing before the Bankruptcy Court. On May 31, 2002, the Trustee also filed a transcript of this hearing.

[11] MMA cites Wisconsin & Southern R.R.–Lease and Operating Exemption–Soo Line R.R., d/b/a CP Rail System, Finance Docket No. 32706 (ICC served Aug. 2, 1995) (Wisconsin & Southern); and Arkansas Central Railway Co., Inc–Operation Exemption–Line of Herzog Stone Products, Inc., et al., Finance Docket No. 31405, et al. (ICC served Apr. l7, 1995) (Arkansas Central).

Trustee suggested that our issuance of an exemption essentially means that we have no interest in this matter. In fact, however, the streamlined process we use to issue exemption authority does not reflect a lack of interest in a particular matter. Rather, certain cases are handled pursuant to the exemption process simply because the agency has found, either in a particular proceeding or as to a "class" of cases — for example, as here, in the class of all trackage rights cases — that a full-scale proceeding is not necessary for us to make the public interest finding that the statute requires of us. Ex Parte No. 282 (Sub-No. 9), Railroad Consolidation Procedures — Trackage Rights Exemption, 1 I.C.C.2d 270 (1985) (Trackage Rights Class Exemption), aff'd sub nom. Illinois Commerce Comm'n v. ICC, 819 F.2d 311 (1987). We accord our decisions in exemption cases the same weight as we do licensing determinations made on the basis of full-scale applications. Those decisions are equally valid from a legal perspective, and authority obtained through the licensing exemption process carries the same force and effect as a license obtained through the full application process.

Another issue that we should clarify at the outset is the effect of revoking an exemption. Because an exemption provides relief from complying with particular statutory provisions, revocation of an exemption typically means simply that those statutory provisions must now be followed if the party that sought the exemption still wants to pursue the matter. For example, in a licensing case, when we deny a request for exemption, it does not mean that the applicant cannot obtain a license; it simply means that the streamlined exemption process is not appropriate for use in that case and that the applicant must go through the full regulatory process to seek a license. Here, of course, the Trustee does not want us to conduct a full-scale regulatory licensing proceeding; rather, he wants us to terminate the trackage rights authority. But mere revocation will not do that here, because, as detailed below, trackage rights, once authorized, may not be discontinued without a specific ruling that discontinuance is in the public interest. And the proper regulatory procedure for obtaining that ruling, where the discontinuance is not consensual on the part of both parties, is an adverse discontinuance proceeding.

With that discussion in mind, and as further explained below, in this case we find: (1) that the Trustee's revocation request does not meet the standard of showing that revocation would advance the rail transportation policy criteria of 49 U.S.C. 10101; (2) that the Trustee's petition to revoke the exemptions is misdirected because, unless we were also to find against CN in an adverse discontinuance case that has not yet been brought, revocation would not terminate CN's rights to operate over the BAR track at issue; and (3) that, even if we were to treat the Trustee's petition as a request for adverse discontinuance, there is no basis on the record now before us to grant such a request.

I. REVOCATION HAS NOT BEEN SUPPORTED ON THIS RECORD.

BAR's petition fails to meet the revocation standards of the statute. Under 49 U.S.C. 10502(d), we may revoke an exemption when the application of a provision of Part A of subtitle IV of Title 49 to a person, class, or transportation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. To justify revocation, a petitioner must meet its burden of proof by articulating reasonable, specific concerns addressing the revocation criteria. Where, as here, an exemption has become effective and administratively final, the request for reopening and revocation is also subject to 49 CFR 1115.4, which requires that the petition "state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances." Indiana Hi-Rail, supra note 6.

The Trustee does not address with any specificity the relevant criteria for revoking the exemption here. Rather, he alleges changed circumstances due to the bankruptcy and vaguely claims that the exemption is not consistent with the RTP and that it is "not appropriate" to let the exemption remain in effect in light of the pending motion before the Bankruptcy Court to reject the underlying agreements.[12] In reality, the Trustee and the Creditors want us to revoke the exemptions so that BAR may command a higher sale price due to the termination of CN's right to operate over the track at issue. That is not adequate justification for revocation under the relevant RTP criteria.

The RTP encompasses the interests of the shipping public and the rail system as a whole, including CN, and not just the interests of BAR and its creditors. Sections 10101(1), (4), (5), (6), (7) and (12) favor competition, reduced barriers to entry into rail service, and reasonable and nondiscriminatory rates. These are the types of considerations that were behind the ICC's decision to adopt the trackage rights class exemption in the first place. Trackage Rights Class Exemption,

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[12] The Trustee cites Riverview Trenton Railroad Company–Petition for Exemption From 49 U.S.C. 10901 To Acquire and Operate A Rail Line In Wayne County, MI, STB Finance Docket No. 34040 (STB served Feb. 14, 2002) (Riverview Trenton) and Jefferson Terminal Railroad Company–Acquisition and Operation Exemption–Crown Enterprises, Inc., STB Finance Docket No. 33950 (STB served Mar. 19, 2001) (Jefferson Terminal) in support of his argument that we have the authority to revoke the exemptions in these two proceedings. Those cases are inapposite. There, persons challenging those transactions filed petitions, based on substantive RTP grounds, to revoke the class exemptions invoked by the parties promptly after the notices invoking the exemptions were filed. Here, BAR did not challenge the grant of trackage rights to CN or the grant of authority to Waterloo; indeed, BAR participated in those transactions and actively supported them. Now, after those exemptions have been in effect for more than a year, the Trustee wants to terminate them, on grounds that have nothing to do with the RTP. Our decisions in Riverview Trenton and Jefferson Terminal do not support the Trustee's position.

1 I.C.C.2d at 276.[13] The exemptions at issue in this case reduced a barrier to entry and increased competition. Moreover, the ultimate objective of BAR and its creditors — to reduce a CN service option available to Fraser — would deprive Fraser of the benefits of a competitive option that was agreed upon over a year ago in arm's-length private-sector discussions.[14]

And the case against revocation is not weakened by the fact that CN is not currently exercising its trackage rights but is serving Fraser through the haulage agreement. Contrary to what the Creditors maintain, Fraser can benefit from the fall-back service availability and competitive option occasioned by the existence of CN's trackage rights, even if CN were never to commence operations under them.[15]

## II. REVOCATION ALONE WOULD NOT EXTINGUISH THE TRACKAGE RIGHTS.

Another problem with the Trustee's request for revocation is that, even if granted, it would not give him the relief that he seeks. In Milford-Bennington, supra, a carrier asked our predecessor agency, the Interstate Commerce Commission (ICC or the Commission), to revoke trackage rights that the tenant carrier had acquired pursuant to the same trackage rights class exemption invoked by CN here. The landlord carrier sought to expel the tenant carrier, claiming numerous violations of the trackage rights agreement. The landlord's position was that, with the exemption revoked, the tenant carrier's authority to operate over the track would automatically expire and it could proceed with

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[13] Indeed, even the statutory provisions governing the full-scale regulatory procedures strongly favor grants of trackage rights applications. Under 49 U.S.C. 11324(d), we must approve trackage rights applications that, as here, do not involve at least two Class I rail carriers if there are no anticompetitive effects, regardless of other public interest considerations. Only if we find anticompetitive effects do we weigh them against the public need. The Trustee has not argued that access to the shipper by an additional carrier here is anticompetitive.

[14] See Verified Statement of Austin S. Durant, attached to Fraser's petition for leave to intervene.

[15] Section 10101(9), although not directly implicated in the class exemption for trackage rights, favors policies that encourage the "honest and efficient management of railroads." The statement of CN officer Clifford L. Carson rebuts any inference that CN acted other than honestly and efficiently in pursuing the exemptions. CN anticipated that BAR was in financial trouble, met with Fraser and BAR management to head off problems, devised an arguably efficient plan to deal with them, and took care, via the trackage rights and easement agreements at issue here, to protect its own financial interests and those of Fraser in the event that BAR were to fail.

eviction. Citing Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 146-48 (1946) (Tex-Mex)[16] and Arkansas & Missouri R.R. Co. v. Mo. Pac. R.R. Co., Finance Docket No. 31282 (ICC served Mar. 17, 1989), the ICC dismissed the petition to revoke the exemption. The Commission stated that, absent a ruling in a discontinuance proceeding that the trackage rights were no longer required to serve the public, those rights would remain in effect even if the exemption were revoked.

Thus, if we were to revoke the trackage rights exemption here, those rights would nonetheless continue in effect, and revocation of the exemption would not produce the result the Trustee seeks. Once the agency approves trackage rights (whether through an individual exemption, a class exemption, or the application process), those rights remain in effect until it is specifically determined that their discontinuance is consistent with the public interest. That determination can only be made in a discontinuance proceeding in which the public interest criteria are addressed directly. CN's rights under the trackage rights agreement, having been authorized by the agency, will remain in effect until discontinuance authority is granted.

Nor is the fact that the trackage rights have not yet been exercised relevant. The decision in Tex-Mex turned on the ICC's primary regulatory jurisdiction and responsibility, not on how long the trackage rights had been in existence or whether they had been used. In this case, the authority took effect on March 14, 2001, by operation of our regulations at 49 CFR 1180.2(d)(7) and 1150.41, the regulations invoked by BAR, VBBC, CN, and Waterloo in these two proceedings. It is the invocation and effectiveness of our authority, not its commercial application, that triggers the rights and responsibilities thereunder. The law requires that the termination of these rights and obligations, including the common carrier obligation, be accomplished by a corresponding grant of discontinuance authority under 49 U.S.C. 10903.

To support their "dormancy" argument, the Creditors cite Arkansas Central, supra note 11. It is true that in its decision in that case, the ICC found no need to revoke an operating exemption where the party that obtained the exemption had not yet begun operations. But that unique case, involving two interrelated exemptions, does not stand for the proposition that an exemption does not become effective until operations are initiated.

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[16] In Tex-Mex, the Supreme Court held that a state court lacked jurisdiction over the trackage rights at issue therein, holding that, once the rights were agreed to, they must remain in effect until the ICC ruled otherwise. In particular, the Court held that the ICC had to act affirmatively to determine whether the "present or future public convenience and necessity" allowed discontinuance under what was then section 1(18) of the Interstate Commerce Act (now 49 U.S.C. 10903) before the rights could be terminated.

In that case, Arkansas Central Railway Company (ACR) was a noncarrier affiliated with a shipper that owned a spur that was excepted from ICC licensing requirements under former 49 U.S.C. 10907 (now 10906). The shipper had been served over the spur by Kansas City Southern Railway Company (KCS), which, given the excepted status of the track, did not need a license to provide the service. When ACR decided that it wanted to become a carrier itself, with the attendant common carrier obligation to serve all shippers requesting service, it sought and obtained an operating exemption, which, upon ACR's commencement of operations, would have converted the spur into a fully regulated line of railroad. Subsequently, KCS obtained the second exemption, for trackage rights over the involved track. KCS's trackage rights, however, could not be used until ACR began operating, because only ACR's operations would convert the excepted track into fully regulated track.

ACR, after further reflection, concluded that it did not want to become a common carrier, and so it asked the ICC to revoke the exemptions that had been granted to it and to KCS. KCS had no objection to this request. The ICC, however, found no need to revoke, because ACR, having never operated over the involved track, had not in fact become a common carrier. Moreover, because the track had never become anything other than a spur, KCS's operations over it continued to be excepted spur operations. Under those circumstances, the ICC found that it would be pointless to apply the revocation standards to ACR's request. Arkansas Central, slip op. at 5.

In this case, CN is already a railroad, the track involved is fully regulated track, and CN wants the exemptions to remain in place. Arkansas Central is simply inapposite, and the fact that CN has not actually operated over the track at issue does not mean that the rights to do so do not exist.[17]

## III. WE HAVE NO BASIS ON THIS RECORD TO ORDER ADVERSE DISCONTINUANCE.

We are concerned about the transportation system that will serve Maine shippers after the bankruptcy proceeding is concluded, and we could explore that matter upon an appropriate record. But the Trustee has not even attempted to show that the survival of BAR's successor is threatened by the agreements, or that the rail transportation system would be better served if CN's trackage rights were set aside. Without at least some substantive input from the Trustee and his supporters on these points, we simply do not have a record on which to weigh the public benefits and detriments of the

[17] In addition to citing Arkansas Central, MMA cites Wisconsin & Southern, supra note 11. Wisconsin & Southern is not on point. There, the ICC held that the trackage rights allowed by the exemption could not become operational until the issue of whether the parties had the right to enter into a trackage rights agreement had been resolved. As in Arkansas Central, the agency held that external factors precluded the rights from taking effect. Here, no such barrier existed, and the rights invoked took effect.

continuation of the trackage rights. Thus, even if we were to treat the Trustee's petition as a request for adverse discontinuance, we find no basis on this record for granting such a request.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Fraser's petition to intervene is granted.

2. MMA's petition to intervene is granted.

3. The Trustee's petition to revoke the exemptions is denied.

4. A copy of this decision will be mailed to:

The Honorable James B. Haines, Chief
United States Bankruptcy Court
for the District of Maine
P.O. Box 17575
Portland, ME 04112-8575

Re: Chapter 11
Case No. 01-11565

5. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary